Supreme Court, U.S.
FILED

(1)

No. 94 314 JUL 21 1994

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1994

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Petitioners,

vs.

ANNA SALTER, PATRICIA TOTH,
MIMI ROSE, NATIONAL CENTER
FOR PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTORS RESEARCH INSTITUTE,
NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, CHARLES VAUGHAN
AND JAMES PETERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Robert E. Sutton
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802

Attorney for Petitioners

56 pp

QUESTIONS PRESENTED

1. Are non-media defendants who are claimed to have defamed a "limited purpose" public figure entitled to the "actual malice" heightened protection of New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964) and its progeny?

2. May a federal court of appeals establish a heretofore undetermined qualified privilege under a state common law of defamation and require a plaintiff to meet the "actual malice" test set forth in New York Times v. Sullivan and its progeny in order to prove abuse of the qualified privilege?

3. Does repetitious sale and presentation of a defamatory videotape satisfy the "actual malice" requirement of New York Times v. Sullivan and its progeny?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES .. 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. THE WRIT SHOULD BE GRANTED BECAUSE REVIEW OF THE DECISION BELOW IS AN OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO DECIDE WHETHER OR NOT THE "ACTUAL MALICE" HEIGHTENED PROTECTION OF NEW YORK TIMES V. SULLIVAN, 376 U.S. 254, 84 S.CT. 710, 11 L. Ed. 2d 686 (1964) AND ITS PROGENY IS TO BE AFFORDED NON-MEDIA DEFENDANTS 6

PAGE

II. THE WRIT SHOULD BE GRANTED BECAUSE THE RATIONALE OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH THE CASE LAW PRECEDENT OF WISCONSIN CONCERNING ITS COMMON LAW REGARDING DEFAMATION AND VIOLATES THE DOCTRINE OF ERIE RAILWAY CO. V. TOMPKINS, 304 U.S. 64, 58 S.CT. 817, 82 L. ED. 1188 (1938) 14

III. THE WRIT SHOULD BE GRANTED BECAUSE THE CASE AFFORDS THE UNITED STATES SUPREME COURT AN OPPORTUNITY TO ANNOUNCE THAT CONTINUED REPUBLICATION OF DEFAMATORY MATERIAL IS RELEVANT AND SUBSTANTIAL EVIDENCE OF "ACTUAL MALICE." 20

CONCLUSION 30

APPENDIX ..... A-1 to A-25

TABLE OF AUTHORITIES

PAGE

CASES:

Adams v. Tanner, 244 U.S. 590 61 L. Ed. 1336, 37 S. Ct. 662 (1917) 7

Benning v. Bd. of Regents of Regency Universities, 928 F. 2d 775 (7th Cir. 1991) 20

Brewer v. Second Baptist Church, 32 Cal. 2d 719, 197 p. 2d 713 (1948) 18, 19

Boyle v. United Technologies Corp., 487 U.S. 500, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988) 19

Bridges v. Wixon, 65 S. Ct. 1443, 326 U.S. 135, 89 L.Ed. 2103 (1945) 8

Calero v. Del Chemical Corp., 68 Wis. 2d 487, 228 N.W. 2d 737 (1947) 15

Chambers v. Nasco, Inc., ____ U.S.____, 111 S. Ct. 2133, 115 L. Ed. 2d 27 (1991) 19

Dalton v. Meister, 52 Wis. 2d 173, 188 N.W. 2d 494 (1971)..... 18

Denny v. Mertz, 106 Wis. 2d 636, 318 N.W. 2d 141 (1982) 9

Erie Railway Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 11, 14, 17

Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) 19

PAGE

Harte-Hanke, Inc. v. Connaughton, 481 U.S. 657, 109 S.Ct. 2678, 105 L. Ed. 2d 562 (1989) 25

Hinnerman v. Dailey Gazette Company, 423 S.E. 2d 560 (W. Va. 1992) 26

Masson v. New Yorker Magazine, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991) 13

Mele v. Sherman Hosp., 838 F. 2d 923 (7th Cir. 1988) 19, 20

New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) 7

Polzin v. Helmbrecht, 54 Wis. 2d 578, 196 N.W. 2d (1972) 18

Salve Regina College v. Russell, 490 U.S. 225, 226, 111 S.Ct. 1217, 113 L.Ed. 2d 190 (1991) 19

Van Stratten v. Milwaukee Journal, 151 Wis. 2d 905, 447 N.W. 2d 105 (Wis. App. 1989) 11

Wells v. Vincennes University, 982 F. 2d 1147 (7th Cir. 1992) 20

MISCELLANEOUS:

Accusations Of Child Sexual Abuse (1988) 4

The Real World of Child Interrogations (1990) 4

"ACCURACY OF EXPERT TESTIMONY IN CHILD SEXUAL ABUSE CHASES: A Case Study Of Ralph Underwager And Hollida Wakefield" 4

No. _____

In The

Supreme Court of the United States

October Term 1994

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Petitioners,

vs.

ANNA SALTER, PATRICIA TOTH,
MIMI ROSE, NATIONAL CENTER
FOR PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTORS RESEARCH INSTITUTE,
NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, CHARLES VAUGHAN
AND JAMES PETERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Ralph Underwager and Hollida Wakefield, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on April 25, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit dated April 25, 1994 sustaining the decision of the United States District Court for the Western District of Wisconsin is reported at 22 F.3d 730 (7th Cir. 1994) and is reprinted at pp. A-1 to A-11 of the Appendix to this Petition. The underlying opinion of the United States District Court for the Western District of Wisconsin dated June 4, 1993 is reprinted at pp. A-12 to A-17 of the Appendix to this Petition. The prior opinion of the United States District Court for the Western District of Wisconsin dated April 6, 1993 is reprinted at pp. A-18 to A-24 of the Appendix to this Petition.

JURISDICTION

The United States District Court for the Seventh Circuit issued its decision on April 25, 1994 affirming the decision of the United States District Court for the Western District of Wisconsin. The jurisdiction of this Court to review the decision of the United States Court of Appeals for the Seventh Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the first amendment of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the government for a redress or grievances."

STATEMENT OF THE CASE

Ralph Underwager, Ph.D. is a Minnesota resident and a licensed psychologist.

Hollida Wakefield is a licensed psychologist and the Administrator for the Institute of Psychological Therapies in Northfield, Minnesota.

The American Prosecutors Research Institute (APRI) is a non-profit research organization affiliated with the National District Attorneys Association with offices in Virginia.

Anna Salter is a psychologist and a resident of New Hampshire.

Mike Munro is a resident of Sydney, Australia and a reporter for the television program "60 Minutes" of Australia. During the summer of 1990 Mr. Munro conducted interviews in connection with preparing a television program for "60 Minutes" of Australia entitled "Witness for Mr. Bubbles." Munro conducted the interviews in New Guinea, Australia, Washington, D.C., New York, Virginia, Minnesota and Indiana. No interviews were conducted in Wisconsin. Munro was never in Wisconsin.

The "Witness for Mr. Bubbles"[1] program was telecast on the Nine Network in Australia on August 5, 1990. It was never again broadcast by the Nine Network. "60 Minutes" of Australia did not formally distribute the videotape for rebroadcast outside of Australia or make it available to other markets. A copy of the video cassette of the "Mr. Bubbles" program was obtained by Patricia Toth, the Director of the National Center for Prosecution of Child Abuse and she played

---

[1]A videotape of the program has been submitted to this Court with this petition. Copies were also submitted to the District Court and Court of Appeals below.

that videotape at the Midwest Conference on Child Sexual Abuse and Incest at Madison, Wisconsin on October 31, 1990. Between December 1, 1991 and January 1, 1993 Toth republished the videotape at conferences throughout the United States on thirteen occasions; in Alabama, Virginia, Ohio, Illinois, Washington, D.C., Indiana, Oregon, Maryland, North Dakota, and Texas.

Anna Salter was also present and a speaker at the Midwest Conference on Child Sexual Abuse and Incest at Madison, Wisconsin in October, 1990. In November, 1990 Mimi Rose, also an employee and agent of the National Center for Prosecution of Child Abuse played the videotape at a conference in Illinois and in 1991 Mimi Rose played the videotape at a conference in Arizona.

James Peters, Anna Salter, and Charles Vaughan all are interviewed during the videotape and make defamatory statements concerning the petitioner, Dr. Ralph Underwager.

In the spring of 1988 Anna Salter proposed to the New England Association of Child Welfare Commissioners and Directors to develop a bibliography on child sexual abuse, interviewing skills, and rebuttal materials. Salter decided to concentrate on the books written by the plaintiffs Underwager and Wakefield, i.e. Accusations of Child Sexual Abuse (1988) and The Real World of Child Interrogations (1990). She authored a monograph entitled "ACCURACY OF EXPERT TESTIMONY IN CHILD SEXUAL ABUSE CASES: A Case Study of Ralph Underwager and Hollida Wakefield." This unpublished monograph has been widely circulated; Salter sent a copy to the National Center for Prosecution of Child Abuse, which has made it available to prosecutors and other interested persons. The monograph is highly critical of the 1988 book and of Ralph Underwager's testimony. The monograph states that the Underwager, Wakefield book misrepresents the studies, rips quotations from their context (and misleadingly redacts them), attributes to scholars positions they once held but have repudiated in light of more recent research and ignores evidence

contradicting its thesis. During her interview on the "Witness for Mr. Bubbles" video program Salter accuses Underwager of distorting facts, providing false testimony and presenting "gobblygook" unsupported by scientific evidence. Anna Salter obtained a copy of the "Mr. Bubbles" videotape and distributes copies from her office for a fee to interested persons.

In the James Peters' portion of the "Witness for Mr. Bubbles" video James Peters asserts that Underwager is dangerous, has lied under oath, and that "....a lot of children have suffered at his hands. Children who have probably been abused have been put back into situations where they're likely to have been molested again."

Charles Vaughan in his portion of the "Witness for Mr. Bubbles" video interview asserts that "....Underwager must have trouble sleeping" and that Underwager used an erroneous theory that a child was delusional in accusing her father of sexual abuse and that the child was doing a favor for the mother.

Mike Munro, the moderator of the "Witness for Mr. Bubbles" videotape endorses and repeats the defamations made concerning Dr. Ralph Underwager throughout the entire program.

On March 19, 1992 petitioners filed a complaint in the United States District Court for the Western District of Wisconsin against the defendants under diversity jurisdiction using the playing of the Mr. Bubbles tape at the Midwest Conference as the actionable event. They named eleven defendants: Anna Salter, Patricia Toth, Mike Munro, National Center for Prosecution of Child Abuse, American Prosecutors Research Institute, National District Attorneys Association, Channel 9 Australia, "60 Minutes" of Australia, Mimi Rose, Charles Vaughan, and James Peters. The National Center for Prosecution of Child Abuse was dismissed as a "project" of the American Prosecutors Research Institute because it was not a juridical entity and could not be sued. Channel 9 Australia and "60 Minutes" of Australia and Munro were subsequently dismissed by stipulation. The District Court dismissed Rose,

Vaughan, and Peters because they had insufficient contacts with Wisconsin. The judge granted summary judgment in favor of the American Prosecutors Research Institute and the National District Attorneys Association because they had nothing to do with the defamation of which plaintiffs complained.[2]

The defendants Salter and Toth moved for summary judgment and after the discovery and submission of affidavits and briefs the District Court initially, by decision dated April 6, 1993, denied the motions. (App. 18 - 24) Upon motions for reconsideration and additional submissions the District Court reversed its April 6, 1993 decision and granted summary judgment to Toth and Salter by Memorandum and Order dated June 4, 1993. (App. 12 - 17)

Plaintiffs timely appealed the grant of summary judgment to the defendants Salter, Toth, American Prosecutors Research Institute, and National District Attorneys Association and the dismissal of the defendants Rose, Vaughan, and Peters to the United States Court of Appeals for the Seventh Circuit. The appeal was argued on December 10, 1993 and the decision rendered on April 25, 1994. (App. 1 - 17)

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE REVIEW OF THE DECISION BELOW IS AN OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO

---

[2] This statement of the case is partially taken from the opinions of the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Western District of Wisconsin. See App. 1 - 24

DECIDE WHETHER OR NOT THE "ACTUAL MALICE" HEIGHTENED PROTECTION OF NEW YORK TIMES V. SULLIVAN, 376 U.S. 254, 84 S. CT. 710, 11 L. Ed. 2d 686 (1964) AND ITS PROGENY IS TO BE AFFORDED NON-MEDIA DEFENDANTS.

Justice Brandeis dissenting in Adams v. Tanner, 244 U.S. 590, 600, 61 L. Ed. 1336, 37 S. Ct. 662 (1917):

"Ex facto jus oritor.[3] That ancient rule must prevail in order that we may have a system of living law." Quoted with approval by Justice Stevens in Bose Corp. v. Consumers Union of U. S., Inc., 466 U. S. 485, 80 L. Ed. 2d 502, 104 S. Ct. 1949 @ 522 fn. 27 (1984).

"....But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advance society's interest in 'inhibited, robust, and wide open' debate on public issues. New York Times v. Sullivan, 376 U.S. at 270. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)" Mr. Justice Powell in Gertz v. Robert Welch, Inc., 418 U.S. 323 at p. 340, 94 S. Ct. 2993,41 L. Ed. 2d 789 (1974).

---

[3]"The law arises from the facts."

The discrete defendants that remained in the case at bar, after the stipulation dismissing Channel Nine Australia, "60 Minutes" of Australia, and Mike Munro, were all non-media defendants.[4] Although the parties had joined issue early on in the District Court on the question of whether or not the non-media defendants were entitled to the heightened protection of the "actual malice" test the District Court avoided answering the question in its initial Memorandum and Order of April 6, 1993 because he concluded that the issue of whether or not the defendants published the statements with "actual malice" was a factual issue remaining for trial. ("Factual issues remain for trial concerning the truth of the alleged defamatory statements and whether or not the defendants published the statements with actual malice. Accordingly, the defendants' motions for summary judgment will be denied.") (App. 23) When the District Court reversed its position in its Memorandum and Decision of June 4, 1993 it, curiously, did not directly revisit or in any way advert to the question of whether or not non-media defendants were entitled to the "actual malice" standard. (App. 12 - 17) Of course, by implication the court decided that the non-media defendants were entitled to the protection because the decision analyzed the submissions in light of the "actual malice" test. ("Both defendants have moved for reconsideration contending that no factual issue remains for trial concerning

---

[4]Even had the Australian defendants remained, since the program was produced and initially published in a foreign country, those non-resident aliens might well not have been entitled to the heightened protection of New York Times v. Sullivan. Mr. Justice Douglas in Bridges v. Wixon, 65 S. Ct. 1443, 326 U.S. 135, 89 L. Ed. 2103 (1945) noted "Freedom of speech and press is afforded aliens residing in this country....." (Emphasis supplied) 326 U.S. @ 148. By implication such protections may not be afforded non-resident aliens.

actual malice"). (Emphasis supplied) (App. 12) Nonetheless, the District Court did not directly address the issue. (App. 12 - 17)

On appeal to the United States Court of Appeals for the Seventh Circuit the parties again exhaustively briefed the question of non-media defendants' entitlement to "actual malice" protection under New York Times and its progeny. The case was venued in Wisconsin and, coincidentally, the Wisconsin Supreme Court had specifically addressed the question and concluded that non-media defendants were NOT entitled to that protection. In Denny v. Mertz, 106 Wis. 2d 636, 318 N.W. 2d 141 (1982) Justice Day speaking for the Wisconsin Supreme Court held:

> "We find no case directly in point on this issue and it appears to be a case of first impression before this court.
>
> The supreme court has not ruled as to whether the standards governing defamation actions set forth in Gertz apply to all defendants, or just media defendants. In Calero, 68 Wis. 2d at 501-507, this court held that the constitutional restrictions on the common law of defamation set forth in Gertz and its predecessors did not apply to a purely private communication between individuals. However in Polzin, 54 Wis. 2d at 586, this court held that critics of the media were entitled to the same level of protection against actions for defamation as was the media, despite the fact that the allegedly libelous statement at issue was contained in a letter from a private individual which was never published. However, that is not an issue in this case....
>
> It would be poor public policy to hold that a defendant defaming a private individual to non-media persons has no constitutional protection but if he disseminates his defamation to the media, then it is protected. A defamation that is published or broadcast

gets infinitely greater circulation and can do the defamed person much greater harm. That such a defamer can then wrap himself in the constitution and acquire greater protection because he has done more harm is not the law of Wisconsin.

While we recognize that some courts in other jurisdictions have held that the Gertz protections apply to all defamations, regardless of whether published through the media or by private persons, we do not read Gertz as requiring that the protections provided therein apply to non-media defendants nor, as stated above, do we consider it good public policy to so decide. We reaffirm our holding to Calero that purely private defamations are not entitled to constitutional protection for, as stated by Mr. Justice Goldberg in his concurring opinion in New York Times, 376 U.S. at 301-02, quoted with approval by this court in Calero, 68 Wis. 2d at 505:

> 'Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.'

We therefore hold that Mertz's statement to Santry is entitled to no constitutional protection and that his liability for the statement, if any, should be determined according to the common law of defamation in this state." [Footnotes omitted.] 106 Wis. 2d 636 at pp. 660 - 661.

The opinion of the Seventh Circuit in the instant case sidestepped the Wisconsin Supreme Court's Denny decision in the following fashion.

"Even so, plaintiffs, insist, they need not establish actual malice because neither Salter nor Toth is a reporter or a publisher of a newspaper. Twelve years ago the Supreme Court of Wisconsin observed that the Supreme Court of the United States 'has not ruled as to whether the standards governing defamation actions set forth in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) applied to all defendants, or just media defendants.' Denny v. Mertz, 106 Wis. 2d 636, 660 318 N.W.2d 141, 152 (1982).

There is still doubt whether the Constitution applies the same standards to media and private defendants. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986); Hutchinson v. Proxmire, 443 U.S. 111, 133 n. 16 (1979). How the Supreme Court understands the First Amendment is, however, neither here nor there. We have been exploring how Wisconsin understands its own law...Cases since Denny have made it clear that a public figure must establish that the defendant acted with actual malice. Van Stratten, the most recent in this line,[5] collects earlier decisions. None of the cases we could find suggests that Wisconsin

---

[5]Van Stratten v. Milwaukee Journal, 151 Wis. 2d 905, 447 N.W. 2d 105 (Wis. App. 1989) is a case clearly involving a media defendant which holds "Because of his status as a limited purpose public figure Van Stratten must recite some facts showing that the newspapers printed the statements with actual malice...." (emphasis supplied) 151 Wis.2d @ 917. How the holding in Van Stratten can be interpreted to support the contention that the Denny v. Mertz holding of the Wisconsin Supreme Court that non-media defendants are not entitled to "actual malice" protection has been reversed, is truly a mystery.

> imposes a lesser burden on a public figure suing a psychologist or prosecutor then on one suing a reporter.
>
> Actually we could not find cases either way on this subject; all of Wisconsin's 'public figure' cases were against media defendants." (App. 7 - 8)

The Court of Appeals for the Seventh Circuit then goes on to decide that under Wisconsin common law there exists a qualified scholar/prosecutor privilege and a plaintiff suing a prosecutor or scholar must meet the "actual malice" burden of New York Times v. Sullivan as a matter of state law. As discussed in § II infra that holding is not only contrary to Wisconsin case law precedent but violative of Erie Railway Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Having made the leap from and avoided answering the question of whether non-media defendants are entitled to the "actual malice" protection, the Court of Appeals for the Seventh Circuit goes on to analyze the evidence directed toward "actual malice" and concludes that the plaintiffs' evidence was insufficient - primarily because the defendants Toth and Salter had sworn that they had investigated the plaintiffs' works and actions and were knowledgeable enough about the persons who made the defamatory statements on the "Mr. Bubbles" tape so that all of the defamatory statements the defendants Toth and Salter believed to be true. Such a holding read the submissions in the light most favorable to the defendants rather than to the plaintiffs, as is the rule:

> "We apply these principles to the case before us. On summary judgment, we must draw all justifiable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence. Anderson v. Liberty Lobby, Inc., 477 U.S., at 255, 91 L. Ed. 2d 202, 106 S.Ct. 2505." Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 115 L. Ed. 2d 447 at 474-75 (1991).

The case at bar squarely raised the issue of whether or not non-media defendants were entitled, as a matter of constitutional First Amendment law, to the heightened protection of the "actual malice" test of New York Times v. Sullivan and its progeny. Neither the District Court nor the Court of Appeals for the Seventh Circuit responded on the issue directly.

Here it is of note that the plaintiffs Underwager and Wakefield are not "household names" in any reasonable sense of that phrase. As a matter of fact, the man on the street survey in Madison, Wisconsin taken well after the case was filed and but a few months before the trial date disclosed that the plaintiffs were virtually unknown to the public at large. What little reknown they had achieved over years of work in their field was confined to a handful of prosecutors, psychologists, and defense attorneys and then solely in the context of discrete civil and criminal trials whereat they presented expert testimony and the limited circulation of the two esoteric books they had written.

Is it reasonable to hold that such limited purpose public figures can be subjected to savage false attack upon their qualifications, integrity, and professional reputation and their attackers are immunized from civil liability by the simple expedient of signing an affidavit that the attackers believe the calumny to be true?[6] Such a holding makes a mockery of the tort of defamation.

---

[6]This expedient was rejected by the Supreme Court in the Masson v. New Yorker Magazine, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991)

II. THE WRIT SHOULD BE GRANTED BECAUSE THE RATIONALE OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH THE CASE LAW PRECEDENT OF WISCONSIN CONCERNING ITS COMMON LAW REGARDING DEFAMATION AND VIOLATES THE DOCTRINE OF ERIE RAILWAY CO. V. TOMPKINS, 304 U.S. 64, 58 S.Ct. 817 L.Ed. 1188 (1938).

"Since the later half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. See L. Eldredge, Law of Defamation 5 (1978).

In Shakespeare's Othello, Iago says to Othello:

'Good name in man and woman, dear my Lord.

Is the immediate jewel of their souls.

Who steals my purse steals trash;

Tis something, nothing;

T'was mine, tis his, and has been slave to thousands;

But he that filches from me my good name

Robs me of that which not enriches him,

And makes me poor indeed.' Act III, Scene 3.

> Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements. Eldredge, supra, at 5. As the common law developed in this country, apart from the issue of damages, one usually needed only allege an unprivileged publication of false and defamatory matter to state a cause of action for defamation. See, e.g., Restatement of Torts § 558 (1938); Gertz v Robert Welch, Inc. 418 US, at 370, 41 L Ed 2d 789, 94 S Ct 2997 (White, J., dissenting) ('Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule'). The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion." Justice Rehnquist in Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed. 2d 1 (1990).

Contrary to the conclusion of the Seventh Circuit that under the common law of the State of Wisconsin there is a qualified scholar/prosecutor privilege which requires a public figure to "…..establish that the defendant acted with actual malice..." in order for a plaintiff to recover against a scholar/prosecutor, the case law precedent of Wisconsin has expressly held that conditional or qualified privileges in Wisconsin are subject to the common law malice tests rather than the exalted and heightened "actual malice" required under federal constitutional law. In Calero v. Del Chemical Corp., 68 Wis. 2d 487, 228 N.W. 2d 737 (1974) Justice Day speaking for the unanimous Wisconsin Supreme Court stated:

> "'Actual malice' in defamation cases refers to a

constitutional standard that is something other than malice as such. As this court said in Polzin v. Helmbrecht (1972), 54 Wis. 2d 578, 587, 588, 196 N.W. 2d 685:

'At the outset it is important to note that there are two types of malice: 'Express malice' is that malice described in the jury instruction used in this case, that is 'ill will, envy, spite, revenge', etc.; the supreme court in Rosenbloom also referred to this type of malice as 'common law malice.' 'Actual malice' (referred to in the New York Times case) is not malice at all, rather it is knowledge that a statement was false or published with reckless disregard of whether it was false or not. 'Actual malice' is what is required for a constitutional determination of libel under New York Times.

'Express' and 'actual' malice are very different concepts.'

The term 'actual malice' arises when there has been an abuse of a constitutional conditional privilege, i.e., where one makes a defamatory statement 'with knowledge that it was false or with reckless disregard of whether it was false or not.' New York Times Co. v. Sullivan (1964), 376 U.S. 254, 279, 280, 84 Sup. Ct. 710, 11 L.Ed. 2d 686, 95 A.L.R.2d 1412.

The problem of actual malice arises in the cases involving first amendment protections afforded to the media such as newspapers, television and radio, or comments made about public officers or public figures. But the defamation alleged here falls within the non-constitutional conditional privilege.

"We need not get into the question of whether the evidence adduced here would have supported a finding of actual malice under the Times test because that is not the test which applies here. The proper test to apply to determine whether the non-constitutional conditional privilege was abused is a question of express

malice. This is what is termed 'common law malice' by the United States Supreme Court. Rosenbloom, p. 37, footnote 9. It exists when the person acts from motives of ill will, envy, spite, revenge or any other bad or corrupt motives." (Emphasis supplied) 68 Wis. 2d @ pp. 499-500, 507.

The Court of Appeals for the Seventh Circuit therefore mistakenly imposed the "actual malice" standard upon the Wisconsin common law concerning conditional, qualified privileges when the appropriate test under Wisconsin common law was "express malice" or "common law malice".

Under the doctrine of Erie Railway Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) the federal courts are constrained by the common law of the several states. Aside from the First Amendment cases there is no federal common law with respect to the tort of defamation. Accordingly, it is for the state courts or legislatures to provide the perameters of the substantive common law governing defamation. Where there is an open question or question of first impression concerning state law obviously a federal court must answer the question. ("Actually, we could not find cases either way on this subject; all of Wisconsin's "public figure" cases were against media defendants.") (App. 8) However, the federal court is not allowed to go beyond the answer and impose upon the State of Wisconsin common law an "actual malice" standard which has been expressly rejected by its case law precedent. The opinion of the Seventh Circuit does just that:

"Plaintiffs therefore need to persuade us that Wisconsin would establish such a distinction for purposes of its domestic law. Yet they offer no reasons to suppose the state would do so.[7] Just as the public has a strong

---

[7]The parties had not been alerted to the possibility that the case would be decided on qualified privilege state law. However plaintiffs had noted Calero v. Del Chemical Corp.,

interest in providing reporters with a qualified privilege to report on current events without fear of liability for accidental misstatements so the public has a strong interest in protecting scholars and prosecutors. We do not disparage the countervailing private interest and reputation; that is why even the New York Times privilege is qualified rather than absolute. The private interests at stake is not greater when the defendant is a psychologist rather than a reporter; the limited circulation of an unpublished monograph implies that any distinction would run the other way. And the private need for the privilege may well be greater in the case of scholars and prosecutors than in the case of newspapers and broadcasters....." (App. 8)

The Court then goes on to hold that the standard to be applied to the qualified privilege that has just been called into existence is "the actual malice" heightened protection of New York Times v. Sullivan and its progeny. There is absolutely nothing from the case law precedent of Wisconsin from which such a conclusion can be drawn. In fact, the opposite is the case. See Calero v. Del Chemical, supra and Polzin v. Helmbrecht, 54 Wis. 2d 578, 196 N.W. 2d (1972). The case law precedent of the State of Wisconsin, unequivocally and resoundingly asserts that the standard to be applied is that of common law express malice.[8] Ill will is the essence of express

---

supra and Dalton v. Meister, 52 Wis. 2d 173, 188 N.W. 2d 494 (1971) which also bore on the issue, in their brief. There was no discussion or argument by any of the parties on the question of Wisconsin qualified privilege.

[8]Many other jurisdictions are in accord. For example California. "Thus the privilege is lost if the publication is motivated by hatred or ill will toward plaintiff..." Brewer v.

malice.

> "At the outset it is important to note that there are two types of malice: "Express malice" is that malice described in the jury instruction used in this case, that is "ill will, envy, spite, revenge," etc.; the Supreme Court in Rosenbloom also referred to this type of malice as "common law malice".... Polzin v. Helmbrecht, 54 Wis. 2d 578, 587, 588, 196 N.W. 2d 685 (1972).

The opinion of the Seventh Circuit created an obvious Erie problem as is evidenced by the jurisprudence of both the United States Supreme Court and the Seventh Circuit. See Salve Regina College v. Russell, 490 U.S. 225, 226, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("The concept of a federal common law, lurking (to use Justice Holmes' phrase) as a brooding omnipresence in the sky; was questioned for some time before being firmly rejected in Erie Railway Co. v. Tompkins ..... Erie mandates that a federal court sitting in diversity apply the substantive law of the forum state, absent a federal statutory or constitutional directive to the contrary."); Chambers v. Nasco, Inc., ____U.S.____, 111 S.Ct. 2133, 2148, 115 L.Ed.2d 27 (1991); Felder v. Casey, 487 U.S. 131, 151, 108 S.Ct. 2302, 101 L.Ed. 2d 123 (1988); Boyle v. United Technologies Corp., 487 U.S. 500, 517, 108 S.Ct. 2510, 101 L.Ed. 2d 442 (1988) (Brennan, J. dissenting) ("Before our decision in Erie....., federal courts sitting in diversity were generally free, in the absence of a controlling state statute, to fashion rules of 'general' federal common law....Erie renounced the prevailing scheme...In pronouncing that "[t]here is no federal general common law,".....Erie put to rest the notion that the grant of diversity jurisdiction to federal courts is itself authority to fashion rules of substantive law.); Mele v. Sherman Hosp., 838

Second Baptist Church, 32 Cal.2d 791, 797, 197 p. 2d 713 (1948).

F. 2d 923, 926 (7th Cir. 1988) ("The constitutional underpinnings of Erie ..... that the states, not the federal government, have the sole power to make law in those areas not specifically reserved to the federal government - counsel that the federal judiciary, when deciding cases based on diversity of citizenship, ought to refrain from intruding unnecessarily into the states' law making process....It should be allowed to develop those principles on a case-by-case basis without unnecessary comment by federal judges."); Wells v. Vincennes University, 982 F. 2d 1147, 1150-51 (7th Cir. 1992); Benning v. Bd. of Regents of Regency Universities, 928 F. 2d 775, 779 (7th Cir. 1991).

III. THE WRIT SHOULD BE GRANTED BECAUSE THE CASE AFFORDS THE UNITED STATES SUPREME COURT AN OPPORTUNITY TO ANNOUNCE THAT CONTINUED REPUBLICATION OF DEFAMATORY MATERIAL IS RELEVANT AND SUBSTANTIAL EVIDENCE OF "ACTUAL MALICE."

> "Leaving aside the special considerations when public officials are the target, New York Times v. Sullivan..., a libelous publication is not protected by the Constitution. Beauharnias v. Illinois, 343 U.S. 250, 96 L. Ed. 919, 72 S. Ct. 752 (1952)" New York v. Ferber, 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982).
>
> "An essentially private dispute that attracts the public interest will not suffice as a public controversy." Time, Inc. v. Firestone, 424 U.S. 448, 454-455, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976).

In order to fully comprehend the significance of the republication by both sale of the "Mr. Bubbles" tape and repeated presentation of the "Mr. Bubbles" videotape at

conferences throughout the United States, it is necessary to recite excerpts, verbatim, made by the participants and interviewees on the "Mr. Bubbles" videotape which defamed the plaintiff, Dr. Ralph Underwager. Some of the statements were:

"**MUNRO:** A girl accuses her own father of rape. Underwager said it was just a delusion [Tape shown of Underwager giving evidence]. The jury didn't believe him.

VAUGHAN: I think Underwager must have trouble sleeping.

MUNRO: ....One of the key Deren witnesses was a hired gun from the United States, a psychologist named Ralph Underwager, who says he is an expert in child sexual abuse. He testified that the childrens' evidence had been contaminated and that they were too young to know what the truth was. But just what is Mr. Underwager's expertise and how much respect does he command in American courts? We went there to find out. And we should warn that at times in this report the language has to be quite explicit....

MUNRO: This is Ralph Underwager psychologist. He was paid Twenty-Five Thousand Dollars and gave crucial evidence in favor of Tony Deren. Evidence which helped Deren walk free....

MUNRO: Ralph Underwager was imperative to Tony Deren's defence. As a supposed independent expert he testified that the evidence of the Bubbles children had become contaminated and they were too young to understand their duty to tell the truth. But, here in America we've certainly discovered Underwager's reputation and credentials aren't all they're cracked up to be.

MUNRO: Mr. Peters, are professional witnesses like Ralph Underwager dangerous?

PETERS: They can be very dangerous....

MUNRO: Jim Peters is a senior attorney with the National Centre for the Prosecution of Child Abuse. He's investigated Underwager for the past three years....
PETERS: Underwager is presented as a scientific observer when in fact from our perspective more often than not he is there as an advocate.
MUNRO: And anything but independent.
PETERS: Anything but.
SALTER: I think he is someone who makes his living going around the country and testifying against children in child sexual abuse cases. He says the same thing in essentially every case which is.....
MUNRO: And Anna Salter knows what's she talking about. A Ph.D. from Harvard and a Master's Degree in early childhood. She says young children can be believed.
MUNRO: Six American states have given Dr. Salter a grant to check Underwager's methods in court and what did she find?
SALTER: That he is inaccurate. That what he says in court does not necessarily fairly represent the literature.
MUNRO: He distorts the facts.
SALTER: Oh....frequently. Sometimes he quotes specific studies and he's frequently wrong about what the studies say....
MUNRO: In Mr. Bubbles case he said his qualifications were never in question.
PETERS: Well if he's talking about the Swan ruling, you could say he was perseverating.
MUNRO: Lying.
PETERS: Yes.
MUNRO: Now the second incident in the Mr. Bubbles case was where Underwager said 'that ninety per cent of accusations against child molesters are wrong.' Now is that backed up scientifically?
SALTER: No that's gobblegook I don't know of any

study that would support that....

MUNRO: Over the past couple of years courts across America have begun saying 'no' to Underwager. That his expert evidence is unreliable. Two recent cases here in New York said just that. But even more damning was a case last year, the Herrick case.

PETERS: It was the court's observation that Dr. Underwager's testimony was based on inadequate research and his preparation was inadequate and therefore lacking in sound foundation.

MUNRO: Again damning.

PETERS: Yes it is.

MUNRO: Well there's no bones about it there, inadequate.

PETERS: In all of these cases that's what the courts have ruled....

MUNRO: Ralph Underwager was hired to defend Polly's father and as usual he testified that nothing had happened. It was all a delusion and Polly had simply made the whole story up. But then Underwager was cross examined by Polly's lawyer, Charles Vaughan.

VAUGHAN: He used the theory that it was a delusion of the child. That she was doing a favor for the mother by saying this happened when it really didn't happen to gain the favor and to be the apple of the eye of the mother.

MUNRO: A delusion that she was continually raped over four days.

VAUGHAN: That's right....

MUNRO: The jury took only an hour to decide that Polly Barnes was telling the truth and that Ralph Underwager's testimony, that nothing had happened, could be ignored. In fact Underwager's evidence was rejected so much the jury awarded Polly three and a quarter million dollars.

MUNRO: So while Underwager was being rejected

here in America he had no such trouble at the Mr. Bubbles hearing in Australia where he testified that the children were too young to tell the truth....

MUNRO: Do you think Underwager has got a lot to answer for over the years?

PETERS: I think so. I think a lot of children have suffered at his hands. Children who probably have been abused have been put back into situations where they're likely to have been molested again....

VAUGHAN: I think that Underwager must have trouble sleeping.

On the motions for summary judgment the plaintiffs had submitted affidavits noting with particularity the falsity of the statements made. In addition, with respect to the monograph, affidavits of five experts in the field were submitted, Drs. David C. Raskin,[9] Martha L. Rogers, William Thompson, Richard A. Gardner, Robyn Dawes, and Jack S. Annon, as well as the deposition testimony of Dr. Wendy Walker, an Australian psychologist who had also testified in the Australian case. Finally, deposition excerpts were submitted from the defendants Salter and Toth wherein they both admitted to the continuing presentation of the "Mr. Bubbles" videotape and the sale and distribution of both the videotape and the monograph.

Perhaps there could be some debate concerning the monograph as being less than a direct attack upon the reputation of the plaintiffs but there can be no question but that the assertions made by the interviewees during the videotape are classic defamation. The District Court so held:

"The Court must first determine whether these

---

[9]A sample of the expert testimony ignored below: "Dr. Salter and Patricia Toth have grossly misrepresented the scientific literature in order to malign the plaintiffs". Par. 3 Affidavit of David C. Raskin, Ph.D.

statements are capable of defamatory meaning. Brown University in Providence, etc. v. Kirsch, 757 F. 2d 124, 128 (7th Cir. 1985). A communication is defamatory if it tends so to harm the reputation of another as to lower him/her in the estimation of the community or to deter third persons from associating or dealing with him/her. Restatement (Second) of Torts, Sec. 559 at 156 (1977). Whether a communication is capable of a defamatory meaning is a matter of law for the court to decide. Modern Products, Inc. v. Schwartz, 734 F. Supp. 362, 363 (E. D. Wis. 1990).

The Court finds that the statements published by defendants are capable of defamatory meaning because they might tend to so harm the reputation of the plaintiffs as to lower them in the estimation of the community and to deter third persons from associating with them.... The truth of the statements remains a genuine factual issue." (App. 22)

Justice Stevens in delivering the majority opinion for the Court in Harte-Hanke, Inc. v. Connaughton, 481 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) discusses the "actual malice" doctrine and its practical application:

"Actual malice, instead, requires at a minimum that the statements were made with a reckless disregard for the truth. And although the concept of 'reckless disregard' 'cannot be fully encompassed in one infallible definition,' St. Amant v. Thompson, 390 US 727, 730, 20 L Ed 2d 262, 88 S Ct 1323 (1968), we have made clear that the defendant must have made the false publication with a 'high degree of awareness of...probable falsity,' Garrison v. Louisiana, 379 US 64, 74, 13 L Ed 2d 125, 85 S Ct 209 (1964), or must have 'entertained serious doubts as to the truth of his publication', St. Amant, supra, at 731, 20 L Ed 2d 262,

88 S Ct 1323.

....Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, see Herbert v. Lando, 441 US 153, 160, 60 L Ed 2d 115, 99 S Ct 1635 (1979); Tavoulareas v. Piro, 260 US App DC 39, 66, 817 F2d 762, 789 (en banc), cert denied, 484 US, 98 L Ed 2d 151, 108 S Ct 200 (1987), and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry....

...The meaning of terms such as 'actual malice' and, more particularly, 'reckless disregard' however, is not readily captured in 'one infallible definition'. St. Amant v. Thompson, 390 US, at 730, 20 L Ed 2d 262, 88 S Ct 1323. Rather, only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards. (Emphasis Supplied ES.) 105 L. Ed. 2d 562 @ 576, 577, 587-588.

Although "ill will" in and of itself admittedly is usually insufficient to prove actual malice it is a factor of relevance. The West Virginia Supreme Court in Hinnerman v. Dailey Gazette Company, 423 S.E. 2d 560 (W. Va. 1992) observed:

"....ill will toward the victim is admissible circumstantial evidence of actual malice." Footnoting to Harte-Hanke. And further:

"....Similarly, although partisanship, animus toward the subject of a libel, or other 'malicious' motives are not, alone, conclusive evidence of actual malice as that term is defined in New York Times v. Sullivan, supra, and subsequent cases, partisanship, ill will toward the subject of the libel, and other 'malicious' motives may be considered by the jury in their determination of whether a subjective realization of the statement was false or a subjective realization that the statement was being published recklessly, existed at the time the

statement was published." (Emphasis Supplied) 423 S. E. 2d @ pp. 572, 573.

In the case at bar the defamatory statements as set forth supra made concerning the plaintiff Ralph Underwager in the course of the "Mr. Bubbles" tape were repeatedly sold and republished after the initiation of the present action against the defendants for defamation. The Court of Appeals for the Seventh Circuit disregards the republications as merely evidence of "ill will" and observes that ".....plaintiffs' counsel have been taken in by the lay connotations of 'actual malice'." (App. 10) To the contrary, petitioners' counsel advanced the argument below that is presented here; to-wit: republication by sale and presentation under the totality of the circumstances should be considered evidence of "actual malice". There is no contrary indication from any prior decision of the United States Supreme Court.

As Justice Stevens observed in Bose Corp. v. Consumers Union:

> "In cases where the line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see.... whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect'. Pennekamp v Florida, 328 US 331, 335 [90 L Ed 1295, 66 S Ct 1029]; see also One, Inc. v Olesen, 355 US 371 [2 L Ed 2d 352, 78 S Ct 364]; Sunshine Book Co. v Summerfield, 355 US 372 [2 L Ed 2d 352, 78 S Ct 365]. We must 'make an independent examination of the whole record,' Edwards v South Carolina, 372 US 229, 235 [9 L Ed 2d 697, 83 S Ct 680], so as to assure ourselves that the judgment does not constitute a forbidden intrusion of the field of free expression.' New York Times v Sullivan, supra, 376 US, at 285, 11 L Ed 2d 686, 84 S

Ct 710, 95 ALR 2d 1412 (footnote omitted)." 80 L. Ed. 2d at 522.

Finally, the factual recitation in the opinion of the Court of Appeals for the Seventh Circuit is mistaken in many significant particulars. Some of the mistakes are minor and careless in nature, such as that Dr. Underwager appeared on the "Today Show", that the producers of the "60 Minutes" program sent a tape of the episode to Salter, who sent a copy to Toth, that Salter's monograph had been written before she was interviewed for the program, and that Underwager's approach has failed to carry the medical profession.[10]

Other factual misstatements are, however, greatly misleading and of significance. For example, the assertion that "all of the other reviews we could find take Salter's side rather than plaintiffs" and "they conclude that most accusations of child sexual abuse stem from memories implanted by faulty techniques rather than from sexual contact between children and adults. The books have not been well received in the medical and scientific press" and "Underwager does not offer any contrary evidence about Toth's investigations and conclusions." On the record Dr. Underwager denied giving such testimony, there are many positive reviews of the books and the plaintiffs submitted exhaustive affidavits from professionals of repute in the field challenging the Salter monograph. The declarations of the plaintiffs set forth the falsity of each specific claim that defendant Toth vouched for and explained how the defendants

---

[10]In fact, Dr. Underwager has never appeared on the "Today Show," Toth received her copy of the program from Dr. Kim Oates, Salter did not publish her monograph until after the program, and the "medical" profession, per se has little if any participation in the controversy, rather it is the province of psychologists, not physicians.

had been advised that Dr. Underwager had not lied under oath or caused children to be sent back to situations where they were sexually abused again, all before the republications of the videotape.

The assertion that Underwager testified at the Deren preliminary hearing "that children are incapable of correctly remembering or accurately describing sexual contacts" was also disputed by Dr. Underwager on the record.

And, finally, the Washington Supreme Court's holding in State v. Swan is a discrete determination made concerning one case and involves the exercise of discretion by a trial judge under Washington Statute E.R. 702. It is unfair and legally imprecise to extrapolate any general or definitive conclusion as to Dr. Underwager's qualifications[11] or whether or not the scientific community accepts his "position on child interviewing" techniques from the Supreme Court of Washington's affirmance of the exercise of discretion. It is significant to note in considering the recital of the facts by the Seventh Circuit that there is a conspicuous absence of reference to the specific derogatory statements made about the plaintiff Underwager during the "Mr. Bubbles" videotape. Other than noting one comment by the defendant Salter made on the videotape - which comment is characterized as a further exposition of her monograph - the opinion makes no reference to what actually was said. One might assume that the rest of the tape was innocuous or, at the most, also merely a criticism of the plaintiffs' books. As noted above, the actual statements made about the petitioner on the "Mr. Bubbles" tape are a savage attack upon his professional reputation. The courts of this nation should afford redress for such scurrilous libel.

The Seventh Circuit opinion demonstrates how a decision

---

[11]Dr. Underwager's legal qualifications as a psychologist cannot be contested.

based on the "actual malice" doctrine in the context of a particular fact situation can result in the acceptance of defamatory statements[12] as true in order to support a grant of summary judgment to defendants.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Dated at Milwaukee, Wisconsin, this 20th day of July, 1994.

Respectfully submitted,

Robert E. Sutton
Attorney for Petitioners
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802

---

[12]The opinion also accepts rank hearsay as fact: ("Underwager served on the board of the False Memory Syndrome Foundation until resigning after being quoted as telling a Dutch journal that sex with children is a "responsible choice for the individual" Stephen Fried, War of Remembrance, Philadelphia 66, 71 (Jan. 1994)". (App. 6) What exception to the hearsay rules does Stephen Fried enjoy? Indeed, who is Stephen Fried? Another "limited purpose public figure", no doubt.

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 93-2422

RALPH UNDERWAGER and HOLLIDA WAKEFIELD,

Plaintiffs-Appellants,

v.

ANNA SALTER, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 92-C-229-S—**John C. Shabaz**, *Judge.*

ARGUED DECEMBER 10, 1993—DECIDED APRIL 25, 1994

Before EASTERBROOK and ROVNER, *Circuit Judges*, and REINHARD, *District Judge.**

EASTERBROOK, *Circuit Judge.* Psychologists Ralph Underwager and Hollida Wakefield have written two books: *Accusations of Child Sexual Abuse* (1988), and *The Real World of Child Interrogations* (1990). They conclude that most accusations of child sexual abuse stem from memories implanted by faulty clinical techniques rather than from sexual contact between children and adults. The books have not been well received in the medical and scientific

---

* Hon. Philip G. Reinhard, of the Northern District of Illinois, sitting by designation.

press. A review of the first in the *Journal of the American Medical Association* concludes that the authors took a one-sided approach: "it may be that the adversarial system has so influenced this discussion [about child abuse] that objectivity no longer has value. The book contains almost 420 text pages and the authors cite over 700 references, but they do not really review this body of literature, they cross-examine it. When a given reference fails to support their viewpoint they simply misstate the conclusion. When they cannot use a quotation out of context from an article, they make unsupported statements, some of which are palpably untrue and others simply unprovable." David L. Chadwick, Book Review, in 261 JAMA 3035 (May 26, 1989).

Underwager's approach has failed to carry the medical profession, but it has endeared him to defense lawyers. He has testified for the defendant in more than 200 child abuse prosecutions and consulted in many others. When prosecutors in Australia concluded that Tony Deren had sexually assaulted children who attended his wife's nursery school, Deren's lawyers hired Underwager, who testified at a preliminary hearing that children are incapable of correctly remembering or accurately describing sexual contacts. The judge accepted this view, which Underwager depicted as the medical consensus, and Deren was not committed for trial. That decision caused a public outcry in Australia, and "60 Minutes Australia," modeled after the CBS series in the United States, decided to look into the subject. Reporter Mike Munro interviewed Underwager at his clinic in Minnesota and traveled to New York to interview other persons, including Anna Salter, a psychologist who had written a monograph about Underwager's conclusions. The program, "Witness for Mr Bubbles" (Deren allegedly assaulted the children in the nursery's whirlpool bath and came to be called "Mr Bubbles" in the Australian press), aired in Australia on August 5, 1990. The producers sent a tape of the episode to Salter, who sent a copy to Patricia Toth. Since 1987 Toth, formerly a criminal prosecutor in Washington state, has been the director of the

National Center for Prosecution of Child Abuse, a project of the American Prosecutors Research Institute.

Salter had for some years doubted that Underwager's books and testimony accurately reflected the clinical literature. After receiving a grant from the New England Association of Child Welfare Commissioners and Directors to finance an annotated bibliography of studies on child abuse interviews, Salter decided to concentrate on the papers Underwager and Wakefield had cited in their 1988 book. Over the course of 18 months Salter read the original works Underwager and Wakefield had discussed. In January 1990 she delivered to the New England Association a monograph titled: "Accuracy of Expert Testimony in Child Sexual Abuse Cases: A Case Study of Ralph Underwager and Hollida Wakefield." This unpublished monograph has been widely circulated; Salter sent a copy to the National Center for Prosecution of Child Abuse, which has made it available to prosecutors and other interested persons. The monograph is highly critical of the 1988 book and of Underwager's testimony. Like Dr. Chadwick's book review, the monograph states that the book misrepresents the studies, rips quotations from their context (and misleadingly redacts them), attributes to scholars positions they once held but have repudiated in light of more recent research, and ignores evidence contradicting its thesis. While Chadwick's indictment of the book advances conclusions but not the supporting evidence, Salter's is packed with details. For her interview with 60 Minutes Australia, however, Salter compressed her conclusions into popular language, telling Munro that Underwager "distorts the facts" and that his testimony in the *Mr Bubbles* case that 90% of all accusations of child molestation are wrong is "gobbledygook" unsupported by any scientific evidence. In October 1990 Toth made a two-hour presentation to prosecutors at the Midwest Conference on Child Sexual Abuse and Incest, held in Madison, Wisconsin. As part of her presentation Toth played the *Mr Bubbles* episode. She has since played the tape at 10 or more other workshops.

Underwager and Wakefield believe that they have been defamed. They filed this action under the diversity jurisdiction in the Western District of Wisconsin, using the playing of the *Mr Bubbles* tape at the Midwest Conference as the actionable event. They named 11 defendants: Salter, Toth, Munro, the National Center for Prosecution of Child Abuse, the American Prosecutors Research Institute, the National District Attorneys Association, Channel 9 Australia, 60 Minutes of Australia, Mimi Rose, Charles Vaughan, and James Peters. The district judge quickly dismissed the National Center for Prosecution of Child Abuse; as a "project" of the American Prosecutors Research Institute it is not a juridical entity and cannot be sued. Channel 9 Australia and 60 Minutes of Australia also appear to be trade names rather than legal entities, but we need not worry about them because they (and Munro) have been dropped from the litigation by consent. Rose, Vaughan, and Peters were among the persons Munro interviewed for the *Mr Bubbles* segment. The district judge dismissed them because they have no contacts with Wisconsin. None of them did anything in Wisconsin, sent anything into Wisconsin, or had any way of knowing that a segment of an Australian TV series would end up being shown at a seminar in Wisconsin. The judge granted summary judgment in favor of the American Prosecutors Research Institute and the National District Attorneys Association because they had nothing to do with the defamation of which plaintiffs complain. These rulings are correct and do not require additional comment. Similarly we step lightly past the question, discussed in detail at oral argument, whether the papers in the district court show complete diversity of citizenship. Additional documents filed after oral argument establish jurisdiction. 28 U.S.C. §1653.

Only Salter and Toth remained as defendants. The district court granted summary judgment in their favor, concluding that no evidence in the record suggests that they acted with "actual malice"—a term that reads to the untutored eye as a proxy for "ill will" but actually means knowledge that the statement was false, or doubts about

its truth coupled with reckless disregard of whether it was false. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2429-30 (1991). See also *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1088 (7th Cir. 1990). The district judge assumed that Salter and Toth hold Underwager in low esteem and would be delighted to see his career as an expert witness in tatters, but the judge held that the undisputed evidence shows that Salter believes that all of her statements are true, that Toth believes that the statements in the *Mr Bubbles* tape are true, and that neither person acted recklessly in reaching these conclusions. Salter and Toth add, in defense of their judgment, that the undisputed facts show that the statements are actually true, making their states of mind (and the care that preceded their statements) irrelevant. Like the district court we shall assume that at least some of the statements are untrue and defamatory. Cf. *Moldea v. New York Times Co.*, 15 F.3d 1137 (D.C. Cir. 1994). Affidavits offered in opposition to the motion for summary judgment create a material dispute on the truth of the statements. Like the district court, however, we believe that there is no bona fide dispute about actual malice.

Before discussing that issue in detail, however, we take up plaintiffs' argument that they need not establish actual malice—either because they are not public figures or because Wisconsin law reserves the actual malice standard for the press. Note that we speak of Wisconsin law, not of the complex of rules under the first amendment that has been developing since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Constitutional defenses are irrelevant unless state law creates liability. Federal courts decide constitutional questions only when necessary. So the first, and as it turns out the last, subject is whether Wisconsin would require Salter and Toth to pay damages. (The parties agree that Wisconsin law applies.) Like other states, Wisconsin recognizes many defenses to claims of

defamation. Some of these have come under the influence of constitutional doctrine in the wake of *New York Times* but remain questions of state law; others have been rooted in the common law from the outset. For example, there is a privilege for statements among persons sharing a common interest—as prosecutors share an interest in knowing about defense strategies in child molestation cases. See *Zinda v. Louisiana Pacific Corp.*, 149 Wis. 2d 913, 440 N.W.2d 548 (1989); *Restatement (2d) of Torts* §596 (1976). Salter and Toth published their statements to persons sharing a common interest, but the privilege is conditional and is lost if abused. Knowledge that the statement is false would constitute abuse, *Ranous v. Hughes*, 30 Wis. 2d 452, 468, 141 N.W.2d 251, 259 (1966), so state law requires us to examine that issue.

According to plaintiffs, this is inappropriate because they are not public figures. Although we doubt the significance of this issue to the privilege outlined in §596 of the *Restatement*, it is potentially important because we do not know the composition of the audience for the works. Have the monograph and tape circulated beyond criminal prosecutors? What the record reveals about the plaintiffs, however, establishes that they are limited-purpose public figures. They have published two books on a subject of great public interest. Underwager has testified in numerous cases and addressed more than 30 conferences on the subject of child sexual abuse. He has appeared on many television programs, including the "Phil Donahue Show," the "Today Show," and "Geraldo," and agreed to be interviewed for the *Mr Bubbles* segment—although he changed his mind after concluding that Munro was not a friendly interviewer, and the tape depicts him shooing the camera crew out of his office and calling Munro a "bastard." Underwager served on the board of the False Memory Syndrome Foundation until resigning after being quoted as telling a Dutch journal that sex with children is a "responsible choice for the individual." Stephen Fried, *War of Remembrance*, Philadelphia 66, 71 (Jan. 1994). Wakefield still is a member of that organization's board. Wisconsin treats as a limited-purpose public figure a person

whose "role in the controversy" explored by the defendant's speech "is more than trivial or tangential". *Van Straten v. Milwaukee Journal*, 151 Wis. 2d 905, 913, 447 N.W.2d 105, 109 (Wis. App. 1989). Both Underwager and Wakefield are "more than trivial or tangential" figures in the public controversy about child abuse, striding into that arena by choice. That a man-on-the-street survey in Madison, Wisconsin, reveals that almost none of the pedestrians could identify Underwager or Wakefield shows little; few people can name the Chief Justice of the United States. Underwager and Wakefield are well-known personages in the legal, medical, and scientific debates about children's ability to describe their sexual experiences; that is quite enough to lead Wisconsin to apply its public figure rules to an analysis of statements about this subject.

Even so, plaintiffs insist, they need not establish actual malice because neither Salter nor Toth is a reporter or the publisher of a newspaper. Twelve years ago the Supreme Court of Wisconsin observed that the Supreme Court of the United States "has not ruled as to whether the standards governing defamation actions set forth in *Gertz* [*v. Robert Welch, Inc.*, 418 U.S. 323 (1974)] apply to all defendants, or just media defendants." *Denny v. Mertz*, 106 Wis. 2d 636, 660, 318 N.W.2d 141, 152 (1982). There is still doubt whether the Constitution applies the same standards to media and private defendants. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 n.4 (1986); *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979). How the Supreme Court understands the first amendment is, however, neither here nor there. We have been exploring how Wisconsin understands its own law. *Denny* held that one private person's defamation of another private person should be adjudicated according to the common law, without any special burden on the plaintiff. 106 Wis. 2d at 661, 318 N.W.2d at 153. We have concluded, however, that Underwager and Wakefield are not private persons; when talk turns to child abuse, they are public figures. Cases since *Denny* have made it clear that a public figure must establish that the defendant

acted with actual malice. *Van Straten*, the most recent in this line, collects earlier decisions. None of the cases we could find suggests that Wisconsin imposes a lesser burden on a public figure suing a psychologist or prosecutor than on one suing a reporter.

Actually, we could not find cases either way on this subject; all of Wisconsin's "public figure" cases were against media defendants. Plaintiffs therefore need to persuade us that Wisconsin would establish such a distinction for purposes of its domestic law. Yet they offer no reasons to suppose the state would do so. Just as the public has a strong interest in providing reporters with a qualified privilege to report on current events without fear of liability for accidental misstatements, so the public has a strong interest in protecting scholars and prosecutors. We do not disparage the countervailing private interest in reputation; that is why even the *New York Times* privilege is qualified rather than absolute. The private interest at stake is not greater when the defendant is a psychologist rather than a reporter; the limited circulation of an unpublished monograph implies that any distinction would run the other way. And the private need for the privilege may well be greater in the case of scholars and prosecutors than in the case of newspapers and broadcasters. Newspapers, magazines, and broadcast stations reap considerable profits from their endeavors, and the obligation to pay damages to those they injure is unlikely to put them out of business or even substantially temper their reports. (Consider that the British press, which lacks the *New York Times* shield, is today at least as likely as the American press to publish adverse information about public figures.) Psychologists compiling monographs with the aid of research grants, and prosecutors seeking to augment one side's arsenal for trial, do not receive comparable rewards. Exposing such persons to large awards of damages is more apt to lead to silence than are comparable awards against media defendants.

What, then, does the record show about actual malice? Did Salter or Toth know that the statements were false?

Did either one harbor doubts about the statements' truth yet plunge recklessly ahead? The record allows no doubt about the answer to either question, for either defendant.

Salter testified by deposition that she read every one of the more than 500 papers her monograph discusses, and that she believes that her interpretation of these studies (and her condemnation of the Underwager and Wakefield interpretation) is correct. Salter's view of the scholarly literature is congruent with Dr. Chadwick's, and all of the other reviews we could find take Salter's side rather than plaintiffs'. Sandra Shrimpton, Book Review (of *Accusations . . .*), 14 Child Abuse & Neglect 601-02 (1990); David L. Chadwick, Book Review (of *Real World . . .*), 15 Child Abuse & Neglect 602-03 (1991); Lenore Olson, Book Review (of *Real World . . .*), 37 Social Work 276 (1992); John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 Mich. L. Rev. 1709, 1711-17 (1990) (discussing *Accusations . . .* and two books by other authors). Some judges have reached a similar conclusion. For example, the Supreme Court of Washington held that Underwager's analysis and conclusions are not accepted by the scientific community, making it appropriate for a trial judge to preclude him from testifying. *State v. Swan*, 114 Wash. 2d 613, 655-56, 790 P.2d 610, 632 (1990). See also *Timmons v. Indiana*, 584 N.E.2d 1108 (Ind. 1992) (sustaining a decision to limit Underwager's testimony severely). Cf. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). It may be that Salter, the judges, and the book reviewers all err in evaluating the Underwager-Wakefield work. Scientific truth is elusive. Nothing in this record suggests, however, that Salter either knew that she was writing falsehoods or feared that she might be doing so but barged ahead without checking.

Toth filed an affidavit describing what she did before playing the *Mr Bubbles* tape. Instead of accepting at face value what reporter Munro and the persons he interviewed had said, Toth read the transcript of the *Deren* hearing, all of the cases to which any of the persons on the tape

referred, and a scientific report on the subject. She concluded that the allegations made against Underwager are true, and only then did she play the tape as part of her presentation. Underwager does not offer any contrary evidence about Toth's investigation and conclusions. (Only Underwager sued Toth; the *Mr Bubbles* tape does not mention Wakefield.)

In lieu of evidence about defendants' investigation and state of mind concerning the truth of their statements, plaintiffs offer the fact that both Salter and Toth have continued publishing the defamatory statements. Salter's monograph remains in circulation, and she continues to pass out copies of the *Mr Bubbles* tape. Toth frequently lectures on the subject of child molestation, and she continues to use the *Mr Bubbles* tape as part of her presentation. Surely this establishes their malice, plaintiffs insist. Repeated publication is the principal reason Underwager and Wakefield offer in support of their claim that Salter and Toth acted with actual malice. The only other evidence is a statement by Wendy Walker, an Australian psychologist, who testified by deposition that the "facial expression, content of speech and body language" of the persons interviewed by 60 Minutes Australia implied that these persons are "strongly negative towards Dr Underwager."

Reliance on these facts shows only that plaintiffs' counsel have been taken in by the lay connotations of "actual malice." We observed at the outset that "actual malice" has nothing in common with "ill will." A person who concludes that a public figure is a knave may shout that conclusion from the mountain tops. Both Salter and Toth came to believe that Underwager is a hired gun who makes a living by deceiving judges about the state of medical knowledge and thus assisting child molesters to evade punishment. Persons who hold such opinions cannot be expected to look kindly on their subjects, and the law certainly does not insist that they shut up as soon as they are challenged. *Van Straten*, 151 Wis. 2d at 917-18, 447 N.W.2d at 110-11 (repeated publication did not establish

actual malice when the speakers believed their statements to be true). Underwager and Wakefield cannot, simply by filing suit and crying "character assassination!", silence those who hold divergent views, no matter how adverse those views may be to plaintiffs' interests. Scientific controversies must be settled by the methods of science rather than by the methods of litigation. Cf. *Buckley v. Fitzsimmons*, No. 89-2441 (7th Cir. Apr. 6, 1994), slip op. 8-11 & n.1. More papers, more discussion, better data, and more satisfactory models—not larger awards of damages—mark the path toward superior understanding of the world around us.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Plaintiffs,

v.

MEMORANDUM AND ORDER
92-C-229-S

ANNA SALTER, PATRICIA TOTH,
MIMI ROSE, NATIONAL CENTER FOR
PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTORS RESEARCH INSTITUTE,
NATIONAL DISTRICT ATTORNEYS ASSOCIATION,
MIKE MUNRO, CHANNEL 9 AUSTRALIA,
"60 MINUTES" OF AUSTRALIA,
CHARLES VAUGHAN, AND JAMES PETERS, SR.,

Defendants.

Plaintiffs Ralph Underwager and Hollida Wakefield claim that defendant Anna Salter defamed their characters. Plaintiff Ralph Underwager claims that defendant Patricia Toth defamed his character.

On April 6, 1993 the Court denied defendants' motions for summary judgment stating that factual issues remained for trial concerning the truth of the alleged defamatory statements and whether said defendants published the statements with actual malice. Both defendants have moved for reconsideration contending that no factual issue remains for trial concerning actual malice.

On April 7, 1993 defendant Salter filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, claiming that she was entitled to judgment in her favor based on the doctrine of collateral estoppel. In support of this motion she submitted a copy of a decision entered on March 23, 1993 in the United States District Court for the Southern District of California.

Under the standard established in New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) and expanded in Gertz v. Robert Welch, 418 U.S. 323 (1974), the plaintiffs as "limited purpose" public figures are prohibited from recovering damages for a defamatory falsehood relating to their conduct unless they prove that defendants' statements were made with actual malice, that is, with knowledge that they were false or with reckless disregard of whether they were false or not. Probative evidence of recklessness includes a publisher's knowledge of serious factual inconsistencies as well as failure to investigate or independently verify disputed or questionable factual assertions. Woods v. Evansville Press Co., Inc., 791 F. 2d 480, 489 (7th Cir. 1986).

In Chang v. Michiana Telecasting Corp., 900 F. 2d 1085, 1090 (7th Cir. 1990), the Court held that the publisher of the statement must have the forbidden state of mind, knowledge that the statement was false or reckless disregard as to its truth. It must be demonstrated that the publisher entertained serious doubts about the truth of the statements before publishing them. Van Straten v. Milwaukee Journal, 151 Wis. 2d 905, 912 (1989). Any "hatefulness" or "ill-will" by the publisher is not relevant. Id. The publisher must have made the publication with a high degree of awareness of probable falsity. Harte-Hanks, Inc. v. Connaughton, 491 U.S. 657 (1989).

Based on the defendants' arguments for reconsideration the Court has once again examined all evidence of record including the additional submissions by plaintiffs on May 3, 1993 and plaintiffs' February 15, 1993 declaration and attached exhibit 23 to determine whether a genuine issue of fact remains concerning actual malice.

In her affidavit defendant Toth states that she believed the statements made on the videotape of the "60 Minutes" of Australia program, "Witness for Mr. Bubbles", to be true and had no reason to doubt the truthfulness of the statements when she played the videotape on October 31, 1990 at the Madison Seminar. Defendant Toth was very familiar with the subject matter discussed by Michael Munro, Jim Peters, Charles Vaughan and defendant Anna Salter on the videotape. She believed before she played the videotape that the statements made by these individuals were substantially true and accurately reflected the facts concerning plaintiff Underwager.

Defendant Toth believed the statements made by Jim Peters on the videotape were true and had no reason to doubt the truth of the statements. She had worked with Jim Peters for three years and had reviewed the materials, particularly the transcript of the Swan case, on which Peters based his statements about plaintiff Underwager.

Defendant Toth believed the statements made by Charles Vaughan on the videotape were true and had no reason to doubt the truthfulness of those statements. Prior to playing the videotape defendant Toth read the transcript of the Barnes trial and determined that Vaughan's statements were consistent with the transcript.

Defendant Toth believed defendant Salter's statements on the videotape were true and had no reason to doubt their truth. Defendant Toth read the Court's opinion in the Swan case and determined that defendant Salter accurately conveyed the Court's opinion during her interview on the videotape. Defendant Toth was also aware of defendant Salter's qualifications and had no reason to doubt her research in the field of child psychology.

Defendant Toth believed Michael Munro's statements on the videotape were true and had no reason to doubt the truth of his statements. Before she played the videotape she read the transcript

of the "Mr. Bubbles" case and summaries of plaintiff Underwager's testimony in other cases which supported Munro's statements.

In their declaration plaintiffs state that defendant Toth's tone of voice, choice of words and false statements when she introduced the videotape at the Madison seminar demonstrated malice. They assert that defendant Toth's refusal to provide them information was malicious. They also assert that defendant Toth's repeated publication of the videotape indicates her intention to attack the plaintiffs' reputations.

Exhibit 23 contains February 15, 1993 affidavits of the following experts: William C. Thompson, David R. Raskin, Martha L. Rogers, Richard A. Gardner, Robyn M. Dawes and Jack S. Annon. These experts support the plaintiffs' research and assert that statements made by defendant Tooth and Salter about said research were false.

On May 3, 1993 plaintiffs' attorney submitted an additional affidavit including relevant excerpts of Dr. Wendy Walker's deposition. This evidence indicates that two other expert witnesses besides plaintiff Underwager testified for Tony Deren ("Mr. Bubbles" at his trial.

All evidence submitted by the plaintiffs viewed in the light most favorable to them fails to dispute the affidavit of defendant Toth. Plaintiffs' evidence raises a factual issue concerning the truth of the statements made on the videotape. However, whether or not the statements are true or false is not material to the issue of actual malice.

Plaintiffs have failed to raise any genuine issue of material fact concerning defendant Toth's belief that the statements on the videotape were true or that she had reason to doubt the truth of the statements. Her investigation and familiarity with the material supports her belief that the statements were true.

There is no dispute concerning said defendant's knowledge

that the statements were true or that they were made with a reckless disregard as to their truth. Defendant Toth is entitled to judgment in her favor as a matter of law because she did not publish the videotape at the Madison seminar with actual malice.

Defendant Salter states in her affidavit that she believed her statements made during the videotaped interview were true and entertained no doubts as to their truthfulness. She further asserts that her conclusions were made after extensive research and investigation of plaintiff Underwager's work, research, court testimony and the relevant professional literature.

Defendant Salter asserts that the statements she made in her monograph were true and she had no doubts as to their truth. She spent over eighteen months reviewing over 500 articles cited by plaintiffs in their book before drawing any conclusions.

In their declaration plaintiffs assert that defendant Salter's failure to respond to their request for information demonstrated malice. They also assert that they cited 900 articles in their book rather than 500. Further, they assert that defendant Salter was totally unaware of any details concerning the production of the videotape. They assert that defendant Salter furnishes the videotape to all who request it for the price of $12.00 which reflects her intention to attack plaintiffs' reputations. They also claim that the affidavits of their experts indicate that defendant Salter's statements concerning their research were false.

This evidence viewed in the light most favorable to plaintiffs does not contradict defendant Salter's affidavit, nor does her deposition testimony taken by plaintiffs on April 9, 1993 which the Court believed necessary to examine. None of the evidence submitted indicates that defendant Salter believed her statements made in the monograph and on the videotape were false or that she had any serious doubts about the truth of her statements. Her extensive research demonstrates that she did not recklessly disregard the truth of the statements which she made.

Defendant Salter had no knowledge that the statements she made on the videotape or in the monograph were false nor did she make them with reckless disregard of the truth. She is entitled to judgment in her favor as a matter of law because she did not publish any statements with actual malice.

Because said defendants did not publish statements with actual malice they are entitled to judgment in their favor on plaintiffs' defamation claims. Their motions for reconsideration will be granted and judgment will be entered in their favor. Defendant Salter's motion for summary judgment on the basis of collateral estoppel will be denied as moot.

ORDER

IT IS ORDERED that defendants' motions for reconsideration are GRANTED.

IT IS FURTHER ORDERED that the motions of defendants Salter and Toth for summary judgment are GRANTED.

IT IS FURTHER ORDERED that defendant Salter's motion for summary judgment on the basis of collateral estoppel is DENIED as moot.

IT IS FURTHER ORDERED that judgment is entered in favor of all defendants against the plaintiffs DISMISSING their complaint and all claims contained therein with prejudice and costs.

Entered this 4th day of June, 1993.

BY THE COURT:

JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Plaintiffs,

v.

MEMORANDUM AND ORDER
92-C-229-S

ANNA SALTER and
PATRICIA TOTH,

Defendants.

Plaintiff Ralph Underwager claims that defendant Patricia Toth defamed his character. Plaintiffs Ralph Underwager and Hollida Wakefield claim that defendant Anna Salter defamed their characters.

On February 1, 1992 defendant Toth filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact and conclusions of law, affidavits and a brief in support thereof. On February 2, 1993 defendant Salter moved for summary judgment. These motions have been fully briefed and are ready for decision.

Plaintiffs contend that defendants' motions for summary judgment should be denied pursuant to Rule 56(f) because they have not been afforded an opportunity to depose Michael Munro, Anthony McClellan or defendant Salter. Plaintiffs have not shown that their inability to take said depositions has deprived them of facts essential to their opposition of defendants' motions.

Accordingly, their Rule 56(f) motion will be denied. See Chubby, Inc. v. Compuserve, Inc., 776 F. Supp. 135, 144-45 (S.D.N.Y. 1991).

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motions for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiffs Ralph Underwager and Hollida Wakefield are licensed psychologists and residents of Minnesota. Defendant Dr. Anna Salter is a certified psychologist who treats both child and adult victims of sexual and sexual abuse offenders. Defendant Patricia Toth is a former prosecutor and is currently the director of the National Center for Prosecution of Child Abuse.

Plaintiff Dr. Underwager has been retained as an expert

psychological consultant in numerous cases involving child sexual abuse. Plaintiffs co-authored the books Accusations of Child Sexual Abuse and The Real World of Child Interrogations. Plaintiff Underwager has testified in over 220 cases throughout the United States and in Australia, Canada, England, Holland and New Zealand on behalf of defendants accused of sexual abuse in both criminal and civil cases.

Plaintiffs have consulted in approximately 200 additional cases concerning child sexual abuse. They have given 30 presentations regarding child sexual abuse in the United States, England, Australia and New Zealand. Plaintiffs have been interviewed on at least 15 radio and/or television shows concerning child sexual abuse in the United States, Australia, London, Canada and New Zealand. They are prominent proponents of the "leading and suggestive questioning" defense in child sexual abuse cases and "the role of adult social influence in the development of allegations of child sexual abuse."

In the spring of 1988 defendant Salter proposed to the New England Association of Child Welfare Commissioners and Directors to develop a bibliography on child sexual abuse, interviewing skills and rebuttal materials to support the testimony of children in child sexual abuse cases. Defendant Salter's report, entitled "Accuracy of Expert Testimony in Child Sexual Abuse Cases: A Case Study of Ralph Underwager and Hollida Wakefield" was submitted to the New England Association of Child Welfare Commissioners and Directors in January 1990.

In the spring of 1990 defendant Salter was approached by Mike Munro to be interviewed for the "60 Minutes" of Australia program regarding a child sexual abuse case known as the "Mr. Bubbles" case. It was defendant Salter's understanding that the "60 Minutes" program would be aired only in Australia. She did not replay a videotape of that program or suggest that a videotape of that program be played at the Midwest Conference on Child Sexual Abuse and Incest in Madison, Wisconsin (Madison Seminar).

On October 31, 1990 defendant Toth taught a workshop at the Madison Seminar entitled Facts, Fallacies and Hidden Agendas: Current Issues in Child Abuse Intervention. Her workshop was directed at professionals involved in child abuse intervention and prosecution including social workers, case workers, prosecutors, physicians, psychologists and law enforcement personnel. She discussed recently decided child abuse cases, literature about child abuse and child pornography and popular experts in the field including plaintiff Underwager.

Defendant Toth showed numerous slides of newspaper articles, advertisements and photographs from periodicals. She also played a portion of the videotape of the "60 Minutes" of Australia program, "Witness for Mr. Bubbles", which was produced by Anthony McClellan. It was originally broadcast in Australia on August 5, 1990 and includes interviews with plaintiff Underwager, attorney Charles Vaughan, Assistant United States Attorney James Peters and defendant Salter. Charles Vaughan is an attorney licensed to practice law in the state of Indiana who represented Polly Anna Barnes in an action against her father claiming she was assaulted and raped by her father in their family beach house in Florida.

It is disputed whether the alleged defamatory statements published by defendants Salter and Toth are true. It is further disputed whether or not their publications of the statements were done with actual malice.

CONCLUSIONS OF LAW

Plaintiff Ralph Underwager claims that defendant Toth defamed his character when she played a videotape on October 31, 1990 of "Witness for Mr. Bubbles" which contained defamatory statements by Michael Munro, Charles Vaughan, Attorney Peters and defendant Salter. Plaintiffs contend that defendant Salter defamed their character when she made defamatory statements in her monograph and during her interview for the "Witness for Mr. Bubbles" program.

The alleged defamatory statements of defendant Salter are contained in paragraphs 14 and 19 of the plaintiffs' amended complaint. The alleged defamatory statements published by defendant Toth are contained in paragraphs 16-19 of the plaintiffs' amended complaint.

The Court must first determine whether these statements are capable of defamatory meaning. Brown University in Providence, etc. v. Kirsch, 757 F. 2d 124, 128 (7th Cir. 1985). A communication is defamatory if it tends so to harm the reputation of another as to lower him/her in the estimation of the community or to deter third persons from associating or dealing with him/her. Restatement (Second) of Torts, Sec. 559 at 156 (1977). Whether a communication is capable of a defamatory meaning is a matter of law for the court to decide. Modern Products, Inc. v. Schwartz, 734 F. Supp. 362, 363 (E.D. Wis. 1990).

The Court finds that the statements published by defendants are capable of defamatory meaning because they might tend to so harm the reputation of the plaintiffs as to lower them in the estimation of the community and to deter third persons from associating with them. Under Wisconsin law if the statements are substantially true plaintiffs cannot prevail on their defamation claim. Schaefer v. State Bar of Wisconsin, 77 Wis. 2d 120, 252 N.W. 2d 343 (1977). The truth of the statements remains a genuine factual issue.

Defendants move for summary judgment on plaintiffs' defamation claims contending that the plaintiffs are limited purposed public figures and that they are not liable unless their actions were taken with actual malice. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964) the Supreme Court held that a public figure may only recover for a defamation by proving actual malice. In St. Amant v. Thompson, 390 U.S. 727 (1968), the Supreme Court held that in order to prevail on a defamation claim the public official had the burden of proving that a defamation by a non-media individual was made with actual malice. The Supreme Court expanded this standard to include persons who were "limited

purpose" public figures in Gertz v. Robert Welch, 418 U.S. 323 (1974). Denny v. Mertz, 106 Wis. 2d 636, 645, 318 N.W. 2d 141 (1982).

In Van Straten v. Milwaukee Journal, 151 Wis. 2d 905, 913-914 (Ct. App. 1989), the Court provided three steps for determining whether the plaintiff is a limited purpose public figure as follows: "(1) isolating the controversy at issue; (2) examining the plaintiff's role in the controversy to be sure that it is more than trivial or tangential and (3) determining if the alleged defamation was germane to the plaintiff's participation in the controversy."

Based on the undisputed facts, the isolated controversy is the credibility of testimony by children in child sexual abuse cases. The plaintiffs have written two books on this topic and testified in 220 child sexual abuse cases. They have been consulted in 200 additional cases concerning child sexual abuse, have given 30 presentations and been interviewed on at least 15 radio and/or television shows. Plaintiff Underwager was interviewed for the 60 Minutes Australia program, "Witness for Mr. Bubbles." The Court concludes that the plaintiffs' role in the controversy concerning testimony by children in child sexual abuse cases is more than trivial or tangential.

The alleged defamation as presented in plaintiffs' amended complaint by defendants Salter and Toth is germane to the plaintiffs' participation in the controversy. Accordingly, the Court finds that plaintiffs are limited purpose public figures. Since plaintiffs are limited purpose public figures plaintiffs must prove that they published the statements with actual malice. A genuine issue of fact remains concerning whether or not the defendants acted with malice which will be resolved at trial.

Defendants claim they have a qualified privilege because they made the publications in good faith on subject matter in which the person making the statement and the person to whom it is made have a legitimate common interest. See Restatement (Second) of Torts §596. When this privilege exists plaintiffs must prove actual

malice before prevailing. It is not necessary for the Court to determine whether this privilege exists because it has found that the plaintiffs are limited purpose public figures and must therefore prove actual malice before prevailing.

Defendant Salter argues that plaintiffs' defamation claims should be dismissed because they are barred by a two year statute of limitations provided in Sec. 893.57, Wis. Stats. She contends that plaintiffs' cause of action accrued more than two years prior to the date of the commencement of this lawsuit. The alleged defamatory statements made by defendant Toth were republished within two years of the commencement of this suit. Accordingly, plaintiffs' claims are not barred by the statute of limitations. Hanson v. A. H. Robbins, 113 Wis. 2d 550 (1983).

Factual issues remain for trial concerning the truth of the alleged defamatory statements and whether or not the defendants published the statements with actual malice. Accordingly, the defendants' motions for summary judgments will be denied.

ORDER

IT IS ORDERED that the motions by defendants Salter and Toth for summary judgment are DENIED.

Entered this 6th day of April, 1993.

BY THE COURT:

JOHN C. SHABAZ
District Judge